No. 11,766

United States Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply of Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company to "Supplemental Memorandum on Behalf of Appellant"

Together with a Memorandum Relative to the Absence of a Formal Verdict

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This is in reply to appellant's Supplemental Memorandum filed July 16, 1948. In that memorandum appellant has completed the shift from the theories of its opening brief which had already begun in its reply brief. The cases cited in the Supplemental Memorandum are either altogether irrelevant or else support appellees, as for example, *Cope v. Anderson*, 331 U.S. 461.

I. THERE HAS BEEN NO CHANGE IN THE RULES CONCERNING THE STATUTE OF LIMITATIONS IN PRIVATE DAMAGE SUITS UNDER THE SHERMAN ACT.

It has long been understood that in actions in the federal courts on federally created causes of action the appropriate state statute of limitations applies, in the absence of any federal statute. In *Holmberg v. Armbrecht,* 327 U.S. 392 (1946), the Supreme Court held that *in suits in equity* on federally created causes of action the state statute of limitations did not control; but the court reaffirmed the application of state statutes *to actions at law.* To avoid the statute of limitations, otherwise unavoidable, appellant in its opening brief therefore contended that a treble damage action under the Sherman Act is a suit in equity. We demonstrated that this is not so (Brief pp. 50-53) and pointed out that in the *Holmberg* case the court clearly referred to actions for treble damages under the Sherman Act as being actions at law and therefore subject to the state statutes. We now observe that in one of the cases cited in appellant's Supplemental Memorandum, *Mercoid Corporation v. Mid-Continent Co.,* 320 U.S. 661, the court (at p. 671) cited with approval the decision of Mr. Justice Holmes in *Fleitmann v. Welsbach Street Lighting Co.,* 240 U.S. 27, that an action for damages under the Sherman Act can only be brought at law.[1]

Consequently, in its Supplemental Memorandum appellant shifts reliance to another but altogether nebulous argument, to the effect that the statute should be applied "flexibly," whatever that may mean. In this connection appellant cites *Cope v. Anderson,* 331 U.S. 461.

But that decision did not enlarge the exception stated in the *Holmberg* case to the rule that the state statutes of limitations

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1. Cf. also, *Venner v. Pennsylvania Steel Co.,* 250 Fed. 292, 296: "Obviously such suits [to recover damages under the Sherman Act] include only actions at law."

apply. On the contrary, it limited the exception. *Cope v. Anderson* reverted to the rule that suits in federal courts on federally created statutes are indeed governed by state statutes of limitations, and it applied the rule to a suit in equity. It limited the exception of *Holmberg* to a case where not only was the suit in equity but where also the gravamen of the action was equitable, and it refused to apply the exception when equity had jurisdiction only because of collateral circumstances such as multiplicity of parties. Contrary to appellant's contention, nothing in the case even remotely suggests that in any action at law the rule applicable to suits in equity may possibly apply. The court said (p. 463):

> "Even though these suits are in equity the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the *legal obligation* here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy. *Russell v. Todd,* 309 U.S. 280, 289 and cases cited. See also *Guaranty Trust Co. v. York,* 326 U.S. 99; *Holmberg v. Armbrecht,* 327 U.S. 392, 395-396."[2]

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2. The difference between *Holmberg v. Armbrecht* and *Cope v. Anderson* is that the former was a creditor's bill to recover on stockholder's liability under the federal Farm Loan Act, while the latter was a suit by a receiver to recover an assessment against stockholders under the National Banking Act. The difference between the two is clearly explaind by Mr. Justice Holmes in *Wheeler v. Greene,* 280 U.S. 49, and in *Christopher v. Brusselback,* 302 U.S. 500 at 502. Under the National Banking Act the Comptroller of the Currency may levy an assessment on stockholders of the bank in fixed amounts and the receiver may sue to recover the assessment. The obligation is therefore a legal one as distinguished from equitable, although recourse to equity may be had to avoid multiplicity of suits. But the Farm Loan Act does not provide for assessments and confers no right on the receiver to sue to recover. The only relief is by a creditor's bill against all stockholders to recover, not any fixed sum, but whatever may be necessary to pay the creditors. The suit is therefore necessarily in equity and could never be at law.

The obligation under the Sherman Act to pay damages is purely a legal obligation, not only in form but in substance. The state statute of limitations therefore applies, and no exceptions whatever have been intimated by the courts. This very fact is clearly recognized both in *Holmberg v. Armbrecht* and in *Cope v. Anderson,* supra, which do not whittle away the settled rule but consciously reaffirm it.

In *Holmberg v. Armbrecht,* supra, the court had said (p. 395):

> "Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See *Campbell v. Haverhill,* 155 U.S. 610; *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390; *Rawlings v. Ray,* 312 U.S. 96."

In the *Cope* case the court said (p. 466):

> "Moreover, limitations on federally created rights to sue have similarly been considered to be governed by the limitations law of the state where the crucial combination of events transpired. *Seaboard Terminals Corp. v. Standard Oil Co.,* 24 F. Supp. 1018, 104 F.2d 659; *Bluefields S.S. Co. v. United Fruit Co.,* 243 F. 1, 19-20. See *Campbell v. Haverhill,* 155 U.S. 610; *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390, 397."

The *Chattanooga* case, cited in both of these passages, and the *Seaboard* and *Bluefield* cases, cited in the quotation from *Cope v. Anderson, were all actions for treble damages under the Sherman Act,* and in every one of these antitrust cases it was held that such an action is governed by the state statute of limitations. In the *Bluefields* case the court held that the statute began to run when the damage occurred, and the decision was

cited and followed by this Court in *Foster & Kleiser Company v. Special Site Sign Co.*, 85 F.2d 742.

Reference may also profitably be made to *Campbell v. Haverhill,* 155 U.S. 610, since (1) it was cited in each of the passages quoted above from the *Holmberg* case and from *Cope v. Anderson,* (2) it was the basis of the Supreme Court's decision in the *Chattanooga* case that the state statute applies to suits under the Sherman Act, and (3) the plaintiff there made, and the court expressly rejected, exactly the kind of arguments which appellant here has made to the effect that, when a cause of action has been created under federal law and involves a public interest, the state statute of limitations should not be applied or should be applied "flexibly." *Campbell v. Haverhill* was a suit for patent infringement, and the court said (p. 616):

> "But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?
>
> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against

them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods,* 2 Cranch, 336, 342, of a similar statute: 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'

"Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (*Bell v. Morrison,* 1 Pet. 351, 360): 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.' "

In this connection we may also note that in *Kavanagh v. Noble,* 332 U.S. 535, the Supreme Court, speaking of statutes of limitation, said (p. 539):

> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary."

Campbell v. Haverhill also calls attention to another fallacy in appellant's argument. Appellant assumes that its accusations of wrongdoing are true and on that assumption beseeches the court to circumvent the statute of limitations in order to

bring wrongdoers to book. But where there has been delay beyond the period of limitations, neither law nor equity will assume that the asserted claim is a just one or that allegations of wrongdoing are correct and then approach the problem as one of barring or not barring a just claim. Charges of conspiracy, like charges of fraud, are readily made, and a burden of explaining facts actually innocent can sometimes too readily be cast upon a defendant at a time when it is deprived of the full ability to proffer explanation.

Because courts may be incapable of determining wherein lies the truth in occurrences long past, due to the moldering effect of time, statutes of limitation interpose a bar.

No Equitable Issues Are Present.

Furthermore, we inquire, what are the elements which appellant's memorandum claims to be present and which serve to import into this case any equitable issue so as to destroy the certain application of the statute of limitations and introduce the shapeless quality which appellant calls "flexibility"? Appelland speaks (Memo. pp. 8, 9) of "fraud or concealment" and "estoppel."

Now, even if fraud were involved in the case, that would not make it a suit in equity or import an equitable issue. Fraud may entitle one to equitable remedies such as injunction or cancellation, but if he sues for damages, his action is purely and simply a tort action at law; at common law it was an action of trespass on the case (12 *Cal Jur.,* 785, 786). *Ambler v. Choteau,* 107 U.S. 586, was a suit instituted in equity "to recover damages alleged to have been sustained through an unlawful conspiracy to cheat the complainant out of his interest in a certain invention." In holding that a court of equity had no jurisdiction of the suit, the Court, speaking through Mr. Chief Justice Waite, said (p. 590):

> "Upon full consideration, we have no hesitation in saying that it presents no case for such relief in equity as is asked. If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interest in the original invention which is the subject matter of the controversy, the remedy is clearly at law and not in equity."

And again (p. 591):

> "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity."

To the same effect is *Philpott v. Superior Court,* 1 Cal. 2d 512.

Moreover, the present is not an action for fraud at all because a suit under the Sherman Act for damages is not an action for fraud. *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 F.2d 742 (9 Cir.); *State of Oklahoma v. American Book Company,* 144 F.2d 585 (10 Cir.). And see our main brief, p. 66. Fraud enters the case only on appellant's contention that there was "a fraudulent concealment" so as to toll the running of the statute on common law principles, and, where "fraudulent concealment" is relied on for such a purpose, fraud is not the gravamen of the action and is no part of the cause of action. *Foster & Kleiser,* supra; *State of Oklahoma v. American Book Company,* supra. The cases show (cf. one of the cases cited in appellant's Supplemental Memorandum, *Abouaf v. J. D. & A. B. Spreckels Co.,* 26 F. Supp. 830, 833) that the right to recover is "wholly statutory." In the absence of the Sherman Act there would be no right to recover, and the federal courts would have no jurisdiction. Necessarily the applicable statute of limitations is California *C.C.P.* Sec. 338(1), governing an "action upon a liability created by statute, other than a penalty or forfeiture" and not *C.C.P.* Sec. 338(4) relating to "an action for relief on the ground of fraud or mistake."

Similarly, the alleged "estoppel" enters the case only as part of the claim of "fraudulent concealment," for "fraudulent concealment" does indeed rest on estoppel. But it is not true that, if an issue of estoppel enters the case, it becomes cognizable only in equity or that an equitable issue is thereby imported. The doctrine of estoppel operates at law as well as in equity, and in order to justify resort to a court of equity it is necessary to show some ground of equity other than estoppel itself. *Dickerson v. Colgrove,* 100 U.S. 578; *Home Insurance Co. v. Campbell,* 79 F.2d 588 (4 Cir.); *Smith v. Royal Insurance Co., Ltd.,* 93 F.2d 143 (9 Cir.), cer. den. 303 U.S. 656; 31 *C.J.S.* 252.

Of course, there was no "fraudulent concealment" in the present case for reasons fully shown in our brief. If appellant had pleaded and established facts constituting "fraudulent concealment," it would not be necessary for it to advance its nebulous doctrine of "flexibility," and since it has failed to establish its claim of "fraudulent concealment" it cannot disguise that claim as support for its new and nebulous doctrine.

II. THE APPLICATION OF THE STATUTE OF LIMITATIONS TO A PRIVATE LITIGANT CANNOT BE LESSENED BY INCANTATIONS ABOUT THE PUBLIC INTEREST.

Appellant's Supplemental Memorandum makes much of a contention that the public interest is served by private suits for damages. In truth the private plaintiff recovers on the basis of his own rights alone and may not amplify them by the invocation of public interest. Curiously, in every one of the antitrust cases cited by appellant in this connection, relief was denied to plaintiff.

Appellant perverts the meaning of the passages it quotes. Thus it asserts (Memo. pp. 2, 3) that "the plea of the public interest is an essential of a proper cause of action." What the cited cases hold is merely that a private plaintiff cannot re-

cover under the Sherman Act unless he alleges and proves a violation of that Act, and a violation of the Act requires conduct of a character as would tend to restrain free competition so as to control the market in goods or services to the detriment of the public. This is shown by *Apex Hosiery Co. v. Leader,* 310 U.S. 469, and cf. *Hunt v. Crumboch,* 143 F.2d 902 (3 Cir.).[3] But once a violation of the Sherman Act is shown, the private plaintiff does not recover because of the injury to the public but only if there is an injury personal to him and because of the latter fact alone. For example, appellant cites *Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F.2d 885 (4 Cir.). Yet that is one of the cases relied on by us in our main brief (pp. 56-59), and in it the action was held barred by the state statute of limitations. The case places counsel's assertions in their correct light. The court said:

> "To recover, the plaintiff must establish two things: (1) A violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act. In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization or attempt to monopolize interstate commerce in the particular subject matter, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages. [p. 887]

* * * * * * *

3. The cases cited by appellant in this connection were cases of refusal to continue to deal with, or employ a person, as a distributor or agent; this may or may not be a common-law wrong, but it is not a violation of the Sherman Act because there is no impairment of trade or commerce, it being immaterial to the public who is the distributor or agent, so long as the trade continues.

"* * * As the Anti-Trust Act does not itself prescribe the period of limitations for civil suits and there is no other federal statute applicable thereto, the period of limitations is that fixed by the local law of the State of West Virginia. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241." (p. 890)

Appellant quotes a passage from *Mid-West Theatres Co. v. Co-Operative Theatres,* 43 F. Supp. 216, but the preceding passage and that immediately following are omitted. The court was there referring merely to leniency in admitting evidence so as to give it an understanding of the industry background. In the preceding passage it said (p. 220):

"This court was very liberal in admitting evidence of numerous other theater situations in the Detroit area where Co-Operative had acted improperly either in treatment of its own membership or other exhibitors.

"The court considered this evidence as disclosing a comprehensive and complete picture of the moving picture industry and its operations in the Detroit area. Ever since Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957, it has become increasingly apparent that where, in a private controversy, there are questions which may seriously affect public interest, the ordinary rules of evidence and relevancy need not always be followed."

And in the immediately following passage it said (p. 220):

"But plaintiff cannot rely on a showing of wrongs to others. It can rely only on a showing of injury to itself. Carbonic Gas Co. of America v. Pure Carbonic Co., D.C., 4 F. Supp. 992, 993; Ketchum v. Denver & Rio Grande R. Co., 8 Cir., 248 F. 106.

"Plaintiff must show that defendants caused the injury to it, and the injury must be the proximate consequence of the acts of the defendants towards plaintiff and not towards others, and it is not enough to show that forbidden

acts were committed. Glenn Coal Co. v. Dickinson Fuel Co., 4 Cir. 72 F.2d 885; Gerli v. Silk Ass'n, D.C., 36 F.2d 959; Noyes v. Parsons, 9 Cir., 245 F. 689.

"Therefore, though we permitted the parties to make an extended record, nevertheless this opinion limits its conclusions to the invaded rights of plaintiff only."

Recovery of damages to the plaintiff was denied.

The Action Is Not One to Enforce a Penalty or to Punish a Crime.

The argument at pages 9 and 10 of the Supplemental Memorandum that the "theory of the triple damage action is that the defendant should suffer a penalty because he has committed a crime," that "the purpose of giving a plaintiff triple damages has nothing to do with compensating him for injuries sustained," and "has precisely the same purpose as a criminal penalty" simply has no substance.

Indeed, if the essential nature of a suit by a private party to recover triple damages were to impose a penalty, then the applicable statute of limitations would be Cal. *C.C.P.* Sec. 340(1), which provides a period of only one year in

> "an action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation."

In *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390, in which the Supreme Court first considered what statute of limitations applied to private suits for damages under the Sherman Act, it held that the suit was not one for a penalty, that therefore neither Rev. Stat. Sec. 1047 (Title 28 U.S.C. Sec. 791) nor the state statute "touching actions for statute penalties" was applicable. The court referred (at p. 397) to *Huntington v. Attrill,* 146 U.S. 657, 668 for the meaning of a suit for a penalty, remarking that the matter had there been

stated so fully that it was not necessary to repeat. In the latter case the court had said that the test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public, considered as a community, or a wrong to the individual, considered as an individual. Thus by its citation of *Huntington v. Attrill* as controlling the Supreme Court in the *Chattanooga* case held that a private suit under the Sherman Act was merely to redress a wrong to the individual as such, and not to redress any wrong to the public.

In *Bruce's Juices v. American Can Co.*, 330 U.S. 743, cited in appellant's Supplemental Memorandum, the court said (at p. 753) that the "principle of the suit for triple damages" is that "the reparation it [the Sherman Act] permits should be measured at least roughly by the extent of the injury caused by the violation." This Court has itself said in *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 at 585 (9 Cir.), "An action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty," citing the *Chattanooga* case and other decisions, including *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 F. 574 (2 Cir.), where the court said (at p. 577): "There can, of course, be no pretense that section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being trebled."

In *Sullivan v. Associated Billposters and Distributors*, 6 F.2d 1000 at 1009 (2 Cir.), the court, speaking of the provision in the Sherman Act for damages to private persons, said that they

> "are clearly remedial. They give a cause of action to any 'person' 'injured in his business or property' by reason of anything forbidden or declared to be unlawful by the act, and they declare that 'a person' 'so injured shall recover threefold' 'the damages by him sustained.' A statute may be penal in one part and remedial in another. If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy

it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury."

In *Strout v. United Shoe Machinery Company,* 195 Fed. 313, it was said (p. 317):

"Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain. It is not in its nature and substance a penal action; its vindication does not rest with the state; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of threefold damages sustained by the plaintiff, which are held to be exemplary damages."

Private Rights Are Not Enlarged or Defenses Limited Because Conferring on an Injured Party a Right to Recover Damages May Serve as a Deterrent to Violation of the Law.

Appellant argues that giving private individuals a right to recovery aids enforcement of the statute. That fact may, in a sense, be true, but it does not enlarge the rights of the private plaintiff or strip a defendant of his defences by some vaporous alchemic reaction. Appellant cites *Maltz v. Sax,* 134 F.2d 2 (7 Cir.), relied on by us in our main brief; the court there said (p. 5):

"While the antitrust statute is for the public benefit and its provision which gives to one damaged by an unlawful combination, three times his actual pecuniary loss, *his action to recover those damages is personal and for his own benefit. It is not one for the benefit of the public.* He must show personal, pecuniary damages. He can only recover his actual damages. Without actual damages to him, there can be no recovery. While this right of the injured party to recover damages was intended to provoke greater respect for the Act, *the individual's cause of action is personal* and dependent solely upon a showing of actual damages to his business or property."

In *Ketchum v. Denver & R. G. R. Co.,* 248 Fed. 106 (8 Cir.), the court said, with numerous citations (p. 111):

> "We are of the opinion, however, that we are not authorized to consider the equities of the case so far as the alleged violation of the Sherman Anti-Trust Act is concerned, as the plaintiff, not having shown any injury to himself, other than as a member of the general public, may not prosecute this action."

In *Bruce's Juices v. American Can Company,* 330 U.S. 743, cited in appellant's Supplemental Memorandum, the court speaking of the provisions of the statute conferring the right of recovery on private parties, said (p. 750):

> "This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress,"

thus making the contrast clear; the public interest is vindicated by a criminal prosecution by the public authorities, while the suit for damages merely redresses the private injury.[4]

Nothing in the other cases cited by appellant supports it. Appellant quotes a passage from *Mercoid Corporation v. Mid-Continent Co.,* 320 U.S. 661, wherein the court declined to grant an injunction, but appellant omits to quote the very next sentence reading, "What we have just said does not, of course, dispose of Mercoid's counterclaim for damages" [under the Sherman Act]; that counterclaim the court disposed of under

4. *Bruce's Juices v. American Can Company,* supra, was an action for the purchase price of goods, in which the defendant, represented by the same counsel who argued the cause here for appellant in this Court, sought to avoid payment by relying on the Robinson-Patman Act. The defense was rejected. Beyond the passages which we have already quoted and which support appellees here, the case is not relevant except that the Court rejected arguments by counsel similar to those he has presented here, as, for example, the argument that the action should somehow be decided on the basis that it was one "of a small business concern trying to battle a business giant" (p. 753), to which the court replied that "To decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous."

settled rules applicable in private litigation. It has always been the practice of courts of equity in giving or denying injunctive relief to consider public convenience as well as the rights of parties litigant, but no such considerations have ever been regarded in damage suits, and the present case is purely one for damages.

Appellant's Supplemental Memorandum again cites *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 338, but the case has no bearing. We have already discussed it briefly in our main brief in a footnote on page 78. The peculiar nature of the decision in that case was recognized by the Court in *Briggs v. Pennsylvania Railroad Co.,* 333 U.S. ....., 92 L.Ed. 1018 (May 1948), where it said (p. 1020):

> "While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 88 L.ed. 1250, 64 S.Ct. 997, it has not been held to survive for the convenience of litigants."

The curious feature of appellant's argument is that it leads to an incongruity bordering on the absurd. From the premise that the purpose of conferring on private parties the right to sue was to aid the public in enforcing the Sherman Act by creating a private group of investigators to supplement the Department of Justice, appellant deduces the conclusion that private parties have a right to defer suing until public authorities have uncovered all necessary evidence! This is a *non-sequitur,* if there ever was one, for the premise would lead to the reverse conclusion.[5] *Quemos Theatre Company v. Warner Brothers Pic-*

5. The illogical argument appears in bald form at page 34 of appellant's reply brief; it is there said: "One of the purposes of the statute is to take the burden of enforcing the Act from Government enforcement agencies and enlist private parties in the business of law enforcement," and four sentences later, "It is in effect an invitation to plaintiffs to wait until the Government has acted and found their evidence for them."

tures, 35 F. Supp. 949, is cited in appellant's Supplemental Memorandum for its statement that private litigants serve as an ancillary force of investigators. Yet there the remark was made to support allowance to the plaintiff in such an action of a liberal right of discovery. This, of course, reinforces the point made in our brief at pages 76 and 77, that a plaintiff has no right to defer suing until he has assembled in his possession conclusive evidence but must make use of discovery procedures.

III. CONCLUDING REMARKS IN REPLY TO APPELLANT'S SUPPLEMENTAL MEMORANDUM

This case is no different from any Sherman Act case, and appellant by its new arguments merely asks this Court to abandon settled rules and create new law. This is a case where continuously since appellant went out of business in early 1929, sixteen years before the suit was brought, it was convinced that appellees had driven it out of business in conspiracy and in violation of the Sherman Act. Whether the alleged conspiracy was formed in one year or another, whether it was express or implied, the cause of action was one and the same during the entire period. In this connection, we note a brilliant analysis in *F. L. Mendez & Co. v. General Motors Corp.,* 161 F.2d 695 (7 Cir.), cer. den. 332 U.S. 810. The fact that the plaintiff may not have evidence of any precise written agreement, as now claimed, is pointless, it being elementary that it is not necessary to prove a formal agreement in order to prove an unlawful conspiracy; such a conspiracy may sometimes be deduced from circumstantial evidence of concert of action. *American Tobacco Company v. United States,* 147 F.2d 93, 103; affirmed 328 U.S. 781, 809. Here appellant was confident for years that no "stronger evidence" than it had was necessary to prove its charges against appellees (cf. our main brief, pp. 10 and 42).

Memorandum Relative to the Absence of a Formal Verdict

By its order of June 21, 1948 this Court directed the Clerk of the District Court to transmit a supplemental record containing the verdict or certifying that there was none, and by supplemental record dated July 23rd it was certified that "no verdict was filed." In view of its request for this supplemental record we assume that the Court is interested in the bearing, if any, of the fact that no verdict was filed, and we therefore submit this memorandum on the subject.

We respectfully submit that the absence of a formal verdict is wholly irrelevant. Before stating the reasons for this submission, a chronological statement of pertinent facts may be helpful.

I. THE PERTINENT FACTS

1. Appellees moved to dismiss the complaint on the ground, *inter alia*, of the statute of limitations (R. 55, 72, 89), both on the face of the complaint alone and on the basis of documentary data.

2. By stipulation it was agreed and ordered that the motion to dismiss should also be treated as a motion for summary judgment as well as a motion to dismiss (R. 105, 107).

3. The motion for summary judgment was denied, but ruling on the motion to dismiss was reserved under *R.C.P.*, Rule 12(d), and a special trial relative to the issue of the statute of limitations was ordered under *R.C.P.*, Rule 42(b) (R. 184, 185).

4. The case was then tried before a jury on a special interrogatory (under *R.C.P.*, Rule 49(a)) in connection with the special issue.

5. Both parties moved for a directed verdict on the special interrogatory (R. 778, 779, 802).

6. The court granted the appellees' motions for directed verdict (R. 805; Minute Order of April 3, 1947 at R. 196).

7. The court so instructed the jury (R. 805).

8. In response to inquiry of appellees' counsel, the court stated that no formal verdict was necessary (R. 806).

9. The jury was then discharged (R. 807).

10. The appellees then moved to dismiss on the ground of the statute of limitations by renewing the motions theretofore made; the motions were then argued orally and ordered submitted on briefs to be filed "on 15 and 15" (R. 806-819).

11. The court then granted the motions to dismiss "for the reasons stated by the court in directing a verdict on the factual issues upon which the defense of the statute of limitations was based" (Minute Order, R. 199).

12. Judgment was then entered dismissing the action. The judgment not only recited that issue had been joined on the statute of limitations, that the factual issues thereon had been tried, and that the motion to dismiss had been granted, but it also contained the recital "a directed verdict thereon having been entered" (R. 199, 200).

13. This judgment and its recital were "approved as to form as provided in local rule 5(d)" by appellant's counsel (R. 200).

14. Appellant made no objections to the absence of a formal verdict.

15. In appealing from the judgment appellant stated the points on which it intended to rely but did not designate the absence of a formal verdict (R. 217, 218).

16. Thereafter appellant filed herein its statement of points relied on (R. 820) and made no such objection.

II. THERE ARE THREE REASONS WHY THE ABSENCE OF A FORMAL VERDICT IS AN IRRELEVANT FACT

The absence of a formal verdict is irrelevant because:

1. The procedure followed was authorized by Rule 50(b) of the *Rules of Civil Procedure.*

2. Even before the *Rules of Civil Procedure,* it was settled law that where a motion for directed verdict is granted, the decision is one of law, the act of the court, and that the return and entry of a verdict are mere formalities and unnecessary.

3. Furthermore, the judgment in this case may also be treated as one entered upon the motion to dismiss or motion for summary judgment, and, so regarded, is proper.

We consider each of these three points.

A. The Procedure Followed Was Authorized by Rule 50(b) of the Rules of Civil Procedure.

Rule 50(b) provides that when a motion for a directed verdict is made and either denied or for any reason not granted, then in the event the jury returns no verdict a party may, within ten days after the jury is discharged, move for judgment in accordance with his motion for directed verdict, and the rule concludes:

> "If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Thus, where a party moves for a directed verdict, the court may discharge the jury without receiving a verdict, and, on timely motion, enter judgment as if a verdict had been returned in favor of the moving party. *Bluebird Taxi Company v. American F. & C. Co.*, 26 F. Supp. 808; *Ryan Distributing Corporation v. Caley,* 147 F.2d 138, 142 (3 Cir.); cf. *Domarek v. Bates Motor Transport Lines, Inc.,* 93 F.2d 522 (7 Cir.).

The facts here bring the case under Rule 50(b). After the jury was discharged, the motion to dismiss was immediately brought up for consideration, i.e., it was renewed, argued and briefed. In short, a motion for judgment in conformity with the motion for directed verdict was made within the time prescribed by Rule 50(b). In due course the motion was granted for the very reasons stated by the court in directing a verdict, and judgment was entered thereon (see p. 19, supra).

If Rule 50(b) is subjected to minute dissection to find a ground to distinguish it, it might be suggested that it applies only where the motion for a directed verdict has been denied or not granted. This would be a narrow reading, unwarranted by the language of the rule and leading to the most incongruous results: (1) The last sentence of the rule, quoted above, demonstrates that the formal entry of a verdict is not essential to permit a judgment to be entered. This, as we show, (pages 21-27) merely recognizes what had theretofore been understood to be the law in the federal courts. (2) The rights of a party to a judgment can hardly be less where the court grants his motion for a directed verdict than where it first denies it. (3) Finally, if a verdict by the jury after direction of the verdict were necessary, it would merely mean that the order granting the motion to direct the verdict had not been consummated and was left incomplete, in other words, that the court had not yet effectively granted the motion. Consequently, the case would still fall squarely under Rule 50(b) as one where the motion has not been passed upon.

B. Even Apart from Rule 50(b), It Was Settled That, Where a Motion for Directed Verdict Is Granted, the Decision Is One of Law, the Act of the Court, and That the Return and Entry of a Formal Verdict Are Mere Formalities and Unnecessary.

In *Cahill v. Chicago, M. & St. P. Ry. Co.*, 74 Fed. 285 (7 Cir.), the District Court directed a verdict, the jury refused to

obey the direction, and the parties then stipulated that a judgment of dismissal could be entered with the same force and effect as if the jury had returned a verdict as directed. The appellate court held that the stipulation should not have been accepted but decided the case as if a verdict had been returned, because no verdict was necessary. It said (p. 290):

> "The authority and duty of a judge to direct a verdict for one party or the other, when, in his opinion, the state of the evidence requires it, is beyond dispute; * * * *We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or by a foreman, and we have no doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury.*"

This passage is quoted approvingly in *Parks v. Southern Railway Co.*, 143 F. 276 (4 Cir.) at 279, and in *Huntt v. McNamee*, 141 Fed. 293 (4 Cir.), and was approved in *Moore v. Petty*, 135 Fed. 668 (8 Cir.), cer. den. 179 U.S. 623, where the court said (p. 675):

> "While the usual and the better practice, where the result is determined by the court as matter of law, is that a formal verdict in writing be returned by the jury, the absence thereof is not fatal to the validity of the proceedings. Cahill v. Railway, 74 Fed. 285, 20 C.C.A. 184."

In *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, the defendant moved for a directed verdict, ruling was reserved, the jury returned a verdict for the plaintiff, the court entered judgment thereon, and the Circuit Court of Appeals reversed on the ground that the motion for directed verdict should have been granted. The appellant argued that the reversal should be accompanied by a direction to the District Court to enter judgment for the defendant, but the Circuit Court held that it had

no power to give that direction, and it merely ordered a new trial. The Supreme Court granted certiorari and held that the reversal should be accompanied by a direction to enter judgment for the defendant. It said (p. 661):

> "Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor."

It also said (p. 659):

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments."

This case demonstrates that there never was any necessity for actual entry of a verdict to support a judgment, where the case was such that a directed verdict was proper. In footnote 5 on pages 659, 660, the Supreme Court called attention to various English cases where judgments were entered as if on a verdict given by the jury.

While the return and entry of a verdict after it has been directed is a common practice, the whole procedure is recognized to be a mere matter of form. In *Bryan v. Louisville & N. R. Co.,* 244 Fed. 650 (8 Cir.), the court said (at p. 661):

> "It is next urged that the court erred when it directed a verdict for the defendant because it asked one of the jurors only to sign the verdict. The juror who was so requested signed it, and it is claimed that it is not such a verdict as will support the judgment. It is urged that whether a case is submitted to a jury on the facts or

> whether the court directs a verdict the jury must act, and that there can be no verdict without the whole jury acts. It is usual for the trial judge, when a verdict is directed, to ask the jury to select a foreman to sign the formal verdict, *but the whole proceeding is a mere matter of form.* * * * and we conclude that the request by the court that the juror sign the verdict, being a mere matter of form, was entirely sufficient without the jury selecting their own foreman. The jury could not act contrary to the decision of the court. * * * and whether the court or jury named the foreman would in no way prejudice the plaintiff."

Consequently, even if a formal verdict should have been entered, which is not the law, failure to do so was mere defect in form—indeed, an omission of the court and not of appellees, for the latter inquired of the court whether a verdict ought not to be returned and were told that it was unnecessary (see p. 19, supra). *R.C.P.*, Rule 61 provides:

> "* * * no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

While, technically, Rule 61 applies only to the District Courts, it is recognized that the same principle applies to the Circuit Courts of Appeals. *Moore on Federal Practice*, p. 3289; *University City, Mo. v. Home Fire & Marine Insurance Co.*, 114 F.2d 288 (8 Cir.); *In re Barnett*, 124 F.2d 1005, 1011 (2 Cir.). And in any event Rule 61 merely repeats the mandate of Title 28 U.S.C., Sec. 777, which applies "in any court of the United States," and of Title 28 U.S.C., Sec. 391, applicable to appellate courts.

Moreover, if omission to have a verdict returned was objectionable practice, the error cannot be raised because no objection was made by appellant in the District Court. In *Bowman v. Atchison, T. & S. F. Ry. Co.,* 184 Fed. 697 (8 Cir.), the court said (at p. 699):

> "The court sustained the motion for a directed verdict and added: 'Enter judgment for the defendant as on the verdict of the jury.' No verdict of the jury appears in the record, and the fair inference is the court dispensed with one. The plaintiff excepted generally to the ruling and the final judgment, but the court was not informed that complaint was made because a verdict was not taken in conformity with the ruling on the motion. And, though it is made the subject of assignments of error, they are not relied on in the brief.

While the court expressed disapproval of the practice of not having a verdict formally entered, it held that where the trial court was not advised that objection was taken to the absence of a formal verdict and no opportunity was thus given to the trial court to correct the omission, there was no error.

In the present case, appellant did not object to the omission of a formal verdict and, on the contrary, approved a judgment reciting that a verdict had been returned. In the *Bowman* case appellant at least assigned the omission as error when he took an appeal. Here there was no such assignment nor any designation of the point as one on which appellant intended to rely. In *Miller v. Union Pacific Railroad Company,* 63 F.2d 574 (8 Cir.) where the District Court had granted a motion to dismiss instead of directing a verdict, the Circuit Court said (p. 577):

> "It is finally urged that the court erred in granting the alternative motion to dismiss the case, instead of directing a verdict. When defendant's motion was submitted, no objection was made to its form, and in the exception taken by plaintiff to the action of the court granting the motion, no complaint was made that the procedure invoked was

objectionable. Had such an objection or exception been taken at the time, the procedure could readily have been cured. The objection is purely technical and could not possibly have prejudiced the plaintiff. What is said by this court in Bowman v. Atchison, T & S. F. R. Co. (C.C.A. 8) 184 F. 697, 699, is here apposite."

* * * * * * *

"In a later case, Wear v. Imperial Window Glass Co. (C.C.A. 8) 224 F. 60, 63, in an opinion by the late Judge Sanborn, it is said: 'There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that there may be a clear record of the rulings and the challenges thereof. For this purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling.'

"If there was even a technical error, it was waived, and cannot be considered by this court. * * * The rule is a just one and affords an opportunity, both to the trial court and opposing counsel, to correct the error, which in the instant case goes only to matters of form; and it enables the appellate court to determine what questions were actually presented to the lower court."

Although there had been no order directing a verdict and therefore no verdict but merely an order of dismissal, the Circuit Court concluded:

"We conclude that the court correctly directed a verdict for the defendant on the ground of contributory negligence, and the judgment appealed from is affirmed."

While formal exceptions in the trial court are no longer required, nevertheless "for all purposes for which an exception

has heretofore been necessary," the party "at the time the ruling or order of the court is made or sought" must make known to the court his objection to the proposed action and his grounds therefor. *R.C.P.,* Rule 46.

There is still another reason why the absence in the record of a written verdict is irrelevant. Here the judgment recites that a verdict was returned, and appellant approved this recital (see p. 19, supra). The case thus comes directly within *Moore v. Petty,* supra, where the court not only held that the intervention of a formal verdict was unnecessary but also said:

> "Complaint is made that the trial court ignored the jury, sustained a motion for judgment, and rendered judgment thereon without the mediation of a verdict. The record, however, does not sustain this contention. *The journal entry, which imports verity, recites that* the plaintiffs moved the court to instruct the jury to return a verdict; that the motion was sustained by the court; that, under the instruction of the court, *the jury returned a verdict;* and upon that verdict the judgment was rendered.

In *Bowman v. Atchison, T. & S. F. Ry. Co.,* supra, the same court explained this to mean that in view of the recital it would conclusively be deemed that an oral verdict was returned, which was sufficient.

C. The Judgment May Also Be Treated as One Entered Upon the Motion to Dismiss, or for Summary Judgment and, So Regarded, Is Proper.

The motion to dismiss specified and urged that the complaint on its face was barred by the Statute of Limitations. On this ground alone, the motion was properly granted (see our main brief, pp. 67-72).

In addition the motion to dismiss and the motion for summary judgment were also made on the ground that the undisputed evidence showed that there was no genuine issue of fact

relative to the Statute of Limitations. In *Gifford v. Travellers' Protective Association,* 153 F.(2d) 209 (9 Cir.), this Court affirmed a summary judgment rendered on the basis of the Statute of Limitations by the same District Judge as here, and held that a motion for summary judgment may be granted whenever the evidence adduced on the motion is such as would warrant a directed verdict. Consequently, since the evidence in the present case was of such a character as to warrant direction of a verdict, there was no genuine issue of fact, and it was appropriate for the court to grant the motion to dismiss or the motion for summary judgment on that basis, wholly without regard to any procedure for completing or effectuating the order granting a directed verdict as such.

Now, here, (1) it is clear that the District Court did in fact base its order of dismissal on the evidence upon which it had directed a verdict, the minute order granting the motion expressly so stating, and (2) it is also clear that it was proper for the court to do so. That evidence consisted entirely of testimony of appellant's chief executive and of documents written by appellant. In other words it consisted entirely of appellant's admissions; and those admissions—documentary and oral—were properly considered in support of the motion, under *R.C.P.,* Rule 56(c), which permits use of "pleadings, depositions and admissions" as well as affidavits, and under *R.C.P.,* Rule 43(e), which provides that,

> "When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard orally, or partly on oral testimony or depositions."[6]

A motion to dismiss may be granted on evidence showing that there is no genuine issue of fact (see cases cited in foot-

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6. *Moore's Federal Practice,* p. 3077 notes that this provision "will prove of service in hearing motions for summary judgment."

note 5 on page 5 of our main brief). Such a motion is in effect a motion for summary judgment, it being immaterial what nomenclature is used to describe it. The recent amendment to Rule 12(b) of the *Rules of Civil Procedure* expressly recognizes the right to rest a motion to dismiss on matters outside the pleadings, treating such a motion as equivalent to a motion for summary judgment. As stated in the notes of the Advisory Committee under Rule 12(b), this amendment really only defined the existing practice carefully. The only requirement is that the parties should be given a reasonable opportunity to present all pertinent material. Such opportunity, obviously, the appellant not only had but exercised.

The judgment may also be deemed correct as having been rendered on the motion for summary judgment for the reasons just expressed. Indeed, here the motion to dismiss and the motion for summary judgment were physically one and the same (see our main brief, p. 5). Although the court, before the trial on the Statute of Limitations had been directed, had entered an order denying the motion for summary judgment, in effect it vacated that order and granted the motion for summary judgment after appellant had been given every opportunity to show that there was a genuine issue of fact and had not only failed to do so but by numerous additional admissions, oral and documentary, had demonstrated that no such issue existed. The court had the power to act in this manner, since an order overruling or denying a motion to dismiss or for judgment is not a final order, and the court may always change its ruling. Cf. *De La Beckwith v. Superior Court,* 146 Cal. 496; *Howe v. Board of Supervisors,* 118 Cal. App. 306; *Bank of America v. Superior Court,* 20 Cal. 2d 697, 702; *Alameda v. The Paraffine Companies,* decided by this Court, July 8, 1948, No. 11,960.

In originally denying the motion for summary judgment the court had done so because it thought that "there might be lurking in the case some matter of weight of evidence" (R. 264),

or, as it put it when it granted the motion for the directed verdict, it had initially denied the motion for summary judgment "for the reason that there might be a factual question in some way necessary to be decided in connection with the plea of the Statute of Limitations" (R. 801), but it had now concluded that no genuine issue existed. These statements were, by express reference, made part of its order dismissing the action (see p. 19, supra).

CONCLUSION

It is respectfully submitted that the absence of a verdict is an irrelevant fact which should not interfere with disposition of the case on its merits, and that on the merits the judgment was clearly right and should be affirmed.

Dated: San Francisco, California, July 29, 1948.

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